

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Los Esteros Critical Energy Facility, LLC	Docket Nos. ER06-268-000 ER06-268-001
Delta Energy Center, LLC	Docket Nos. ER06-261-000 ER03-510-006

ORDER ACCEPTING AND SUSPENDING PROPOSED REVISIONS AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued January 27, 2006)

1. On November 30, 2005, in Docket No. ER06-268-000, as amended on January 11, 2006, Los Esteros Critical Energy Facility, LLC (Los Esteros) filed proposed revisions to its tariff and its Reliability Must-Run Agreement (RMR Agreement) with California Independent System Operator Corporation (CAISO) under section 205 of the Federal Power Act.¹ Also on November 30, 2005, in Docket No. ER06-261-000, Delta Energy Center, LLC (Delta) filed proposed revisions to its RMR Agreement with CAISO under section 205. In this order, the Commission consolidates these dockets, accepts for filing the proposed revisions filed by Los Esteros and Delta, suspends them nominally to become effective January 1, 2006, as requested, subject to refund. We reinstitute proceedings in Docket No. ER03-510-000² and consolidate it with Docket Nos. ER06-268-000, ER06-268-001, and ER06-261-000. We also establish hearing and settlement judge procedures.

¹ 16 U.S.C. § 824d (2000).

² In this proceeding, the Commission accepted Delta's RMR Agreement and set it for hearing and settlement judge procedures. The Commission later approved an uncontested, interim settlement in this docket while negotiations continued for a final settlement. Two parties to the settlement request that the Commission reinstitute proceedings in this docket and establish a procedural schedule for an evidentiary hearing, as further settlement discussions are not likely to be productive.

I. Background

A. Los Esteros' filing in Docket Nos. ER06-268-000 and ER06-268-001

2. Los Esteros filed proposed revisions to its tariff and certain rate schedules of its RMR Agreement³ for the 2006 Contract Year under the terms of its RMR Agreement.⁴ Los Esteros submits revisions to several rate schedules, including Schedule B, Table B-6 (Annual Fixed Revenue Requirement), which uses an AFRR instead of an annual fixed reliability cost (AFRC), to determine RMR rates. In addition, Los Esteros proposes a tariff revision to allow it to transfer any of its units between Condition 1 and Condition 2,⁵ as well as certain other tariff revisions to conform with the CAISO *pro forma* RMR Agreement.
3. Los Esteros submits its Schedule F filing as support for its AFRR. It states that the AFRR has been calculated by application of the formulae in Schedule F, using the costs incurred during the 2005 cost year to determine the AFRR for the 2006 contract year, beginning January 1, 2006.
4. Los Esteros states that since this filing reflects annual rate revisions required pursuant to Schedule F of the RMR Agreement and the RMR Agreement designates an effective date of January 1 of each calendar year, Los Esteros requests waiver of the Commission's 60-day prior notice requirement for an effective date of January 1, 2006.
5. On January 11, 2006, Los Esteros filed Tariff Sheet No. 30 of its RMR Agreement to revise its ramp rates.

³ The RMR Agreement was based on the CAISO *pro forma* RMR Agreement, with some modifications, and was accepted by an order issued on March 24, 2004. *See Los Esteros Critical Energy Facility, LLC*, 106 FERC ¶ 61,270 (2004).

⁴ Specifically, whenever CAISO extends the terms of an RMR Agreement for an additional calendar year, the owner of the designated RMR unit must file updates to the rates and terms of service. The annual update consists of two parts: (1) an informational package filed pursuant to Schedule F of the RMR Agreement (Schedule F filing); and (2) a rate filing made pursuant to section 205 that reflects, among other things, the revised annual fixed revenue requirement (AFRR) contained in the Schedule F filing.

⁵ Under the *pro forma* RMR Agreement, units are designated as Condition 1 or Condition 2. Condition 1 units may participate in market transactions, and the RMR unit owner is permitted to retain all revenues from such market transactions. A Condition 2 unit may not participate in market transactions unless CAISO issues a dispatch notice for the unit.

B. Delta Energy's filings in Docket No. ER06-261-000 and Docket No. ER03-510-006

6. On November 30, 2005, Delta filed proposed revisions to certain rate schedules of its RMR Agreement with CAISO, including a revision to Schedule B, Table B-6 (Annual Fixed Revenue Requirement) to allow use of an AFRR and a Fixed Option Payment Factor (FOPF), instead of an AFRC, to determine RMR rates. Delta also submits its annual Schedule F filing as support for its AFRR because the revised Rate Schedules reflect the data inputs found in the Schedule F filing.⁶

7. Delta states that since this filing reflects annual rate revisions required pursuant to Schedule F of the RMR Agreement and the RMR Agreement designates an effective date of January 1 of each calendar year, Delta requests waiver of the Commission's 60-day prior notice requirement for an effective date of January 1, 2006.

8. Delta initially filed its RMR Agreement, which was based on the CAISO *pro forma* RMR Agreement with some modifications, with the Commission on February 7, 2003 in Docket No. ER03-510-000. The Commission subsequently accepted and suspended the RMR Agreement for a nominal period and made it subject to refund, in an order issued on March 31, 2003.⁷ On May 30, 2003, Delta, CAISO, and Pacific Gas and Electric Company (PG&E) (collectively, the Settling Parties) submitted a settlement agreement (Settlement Agreement) that specified the interim RMR rates that Delta would collect, subject to refund, pending Commission resolution of the methodology to be used in calculating RMR rates generally in Docket No. ER98-495-000. By an order issued on September 10, 2003, the Commission approved the Settlement Agreement.⁸

9. Section II of the Settlement Agreement specifies that Delta will continue to provide services to CAISO pursuant to the rates, terms, and conditions set forth in the interim RMR rates that are specified in a limited section 205 filing made prior to each contract year. Section II also states that if the Settling Parties do not extend negotiations past the period of settlement negotiations, any of the Settling Parties may request

⁶ Delta states that Schedule F of Delta's RMR Agreement provides that if the parties are unable to agree through negotiations on an AFRR or AFRC, "Schedule F establishes the procedures and methodology for determining the Annual Fixed Revenue Requirements (in dollars) and Variable O&M Rates (in \$/MWh) for facilities designated for must-run service for purposes of calculating certain charges for such service under the RMR Contract." Original Sheet No. 169 (effective February 10, 2003). Delta states that it has been designated for must-run service in 2006 and that, to date, the parties have not been able to agree upon an AFRC or AFRR.

⁷ *Delta Energy Center, LLC*, 102 FERC ¶ 61,352 (2003).

⁸ *In re Delta Energy Center, LLC*, 104 FERC ¶ 61,247 (2003).

recommencement of hearing proceedings and/or settlement judge procedures in Docket No. ER03-510-000, and such recommencement would terminate the settlement agreement.

10. Section III of the Settlement Agreement explains that during the term of the Settlement Agreement, CAISO retains the right to determine whether to designate Delta as an RMR Unit for the subsequent contract year or extend the RMR Agreement by giving notice. Section III specifies that Delta will not make a unilateral application to the Commission for a change in any rate covered by the Settlement Agreement under section 205 of the Federal Power Act and the Parties will not seek relief under section 205 or 206 concerning such rate. It also provides that any proposed change with respect to Condition 2 will not be proposed to be effective for the Delta RMR Agreement during the term of the Settlement Agreement. Section III explains that the Settlement Agreement does not limit the rights or remedies of the Parties regarding any dispute arising under the RMR Agreement, when the resolution does not require any modification of its rates terms or conditions.

11. According to CAISO and PG&E, the period of settlement negotiations was extended twice on September 20, 2005 and November 21, 2005 in an effort to reach a final settlement in this proceeding. On December 8, 2005, CAISO and PG&E filed a motion to reinstitute proceedings in Docket No. ER03-510-006, stating that further settlement discussions are not likely to be productive and requesting that the Commission establish a procedural schedule for an evidentiary hearing in the proceeding.

II. Notice of Filings and Responsive Pleadings

12. Notice of Los Esteros' and Delta Energy's November 30, 2006 filings was published in the *Federal Register*, 70 Fed. Reg. 73,998 (2005), with comments, interventions, and protests due on or before December 21, 2005. The California Public Utilities Commission (California Commission) filed a notice of intervention. PG&E, CAISO, California Electricity Oversight Board (Oversight Board), Southern California Edison Company (SoCal Edison) filed motions to intervene. The City of Santa Clara, California (Santa Clara) filed a motion to intervene in Docket No. ER06-268-000 only. CAISO, PG&E, the California Commission, and the Oversight Board (collectively, the California Parties) filed a protest and a motion to consolidate. PG&E and the California Commission (together with the California Parties, Protesters) jointly filed a supplemental protest to the California Parties' protest and a motion to reject. Delta Energy and Los Esteros jointly filed an answer. The California Parties filed an answer. Delta Energy and Los Esteros filed an answer to the California Parties' answer. Notice of Los Esteros' January 11, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 4,127 (2006), with comments, interventions, and protests due on or before February 1, 2006. None was filed.

13. The California Parties request that the Commission consolidate the three proceedings in Docket Nos. ER06-268-000, ER06-261-000, and ER03-510-000 because they raise common issues of law and fact.⁹ The California Parties further request that the Commission set the proposed revisions for hearing, with a five-month suspension period. In their answer, Delta and Los Esteros argue that the Commission should accept the proposed revisions, effective January 1, 2006, with nominal suspension, consolidate them for hearing procedures with Docket No. ER03-510-000, and immediately set all matters for settlement judge procedures. They contend that the Commission should not suspend the proposed revisions for the maximum five-month suspension period because the Protesters provide no reason why the proposed revised rates should be considered excessive. They state that the sole reason for the increase in rates is the difference between the supplanted AFRC-based formula rates by the new AFRR-based formula rates, as prescribed by Schedule B, Paragraph 8 of the RMR Agreement. They claim that a five-month suspension would deprive Delta the ability to elect Condition 2 now that the Settlement Agreement has expired.

14. The California Parties argue that Delta's and Los Esteros' proposed rate increases are unjust and unreasonable because they are an unprecedented increase over current 2005 rates and the proposed rates bid by Calpine in CAISO's annual competitive bid process (LARS process). The California Parties argue that neither Delta nor Los Esteros has provided any support justifying the extraordinary rate increases. They request that the Commission deny waiver of the Commission's cost support requirements under section 35.13 of the Commission's regulations. Delta and Los Esteros respond that they provided sufficient support for the proposed rate increases, as their Schedule F informational package contains the information generally submitted by other RMR owners in their annual cost filings and constitutes the requisite support for AFRR and resulting formula rates. They state that the Commission typically accepts these filings, effective January 1 of each contract year, with nominal suspension, subject to Schedule F discovery rights, and Commission hearing and/or settlement procedures.

15. The California Parties argue that Los Esteros has not justified, as just and reasonable, its unilateral filing to revise its RMR Agreement to allow it to transfer between Condition 1 and Condition 2, and that neither Delta nor Los Esteros have justified their proposals to transfer from their existing AFRC formula rates to the

⁹ Specifically, they argue that: (1) both Los Esteros and Delta are wholly-owned subsidiaries of Calpine Corporation (Calpine); (2) all proceedings involve RMR agreements modeled after CAISO's *pro forma* RMR Agreement, under which Delta and Los Esteros provide the same services, within the same control area; (3) the same parties have intervened in both proceedings; and (4) the proceeding in Docket No. ER03-510-000 has the same fundamental rate issue.

alternative AFRR formula. Los Esteros responds that it has properly amended its RMR Agreement to allow it to change from Condition 1 to Condition 2 on the same terms as other RMR units, to conform to the *pro forma* RMR tariff.

16. The California Parties state that Los Esteros should correct the ramp rates stated in Schedule A, section 8 of its filing (Sheet No. 130) to match the ramp rates contained in CAISO's Master File. Los Esteros agrees to revise its ramp rates set forth in Schedule A, section 8 at Sheet No. 130 and filed in Docket No. ER06-268-001 a revised tariff sheet on January 11, 2006.

17. The California Parties request that upon expiration of the suspension period, the potential refund amount should be held in escrow, since Calpine is currently a debtor in bankruptcy, based on *Devon Power LLC*,¹⁰ where the Commission directed that funds collected from ratepayers should be placed in an escrow account in case of a potential bankruptcy filing. Delta and Los Esteros argue that the Commission should not order that potential refunds be held in escrow because such an action is only to protect ratepayers from possible future bankruptcy. Here, they assert, they already have filed for bankruptcy, so refunds relating to Contract Year 2006 would have priority as post-petition debts.

18. PG&E and the California Commission also state that both Los Esteros' and Delta's proposed revisions should be rejected. First, they argue that the proposed rates are inconsistent with Delta's and Los Esteros' obligations to the CAISO because the proposed rates are much higher than those rates bid in the LARS process for 2006. They contend that permitting RMR unit owners to ignore their bids in a section 205 filing undermines CAISO's ability to select the most cost efficient resource to meet a local reliability need.

19. Delta and Los Esteros respond that the Protesters ignore the express authorization in Schedule B, Paragraph 8 of the RMR Agreement, which allows RMR owners to make a limited section 205 filing using prescribed tables, equations and formulas from Schedule B of the *pro forma* tariff, incorporating a Schedule F-based AFRR in place of the continued use of a specified AFRC. They state that the proposed rate revisions are not unilateral rate modifications as the Protesters have characterized them but rather are limited, annual section 205 filings to substitute new formulas that are explicitly authorized and prescribed by the existing RMR Agreement. They also argue that these filings are not limited by any contractual obligations to the CAISO arising out of participation in the LARS process.

¹⁰ 102 FERC ¶ 61,314 (2003).

20. In their answer, the California Parties again request suspension of Los Esteros' and Delta's proposed revisions for five months. They also argue that escrowing potential refunds is still necessary, even if Calpine has already declared bankruptcy, because payment of refunds would not have to be made until the effective date of a bankruptcy plan that has been confirmed by the bankruptcy court and that there is no deadline for a debtor to propose or obtain confirmation of a Chapter 11 bankruptcy plan. Further, the California Parties argue that ratepayers are not adequately protected because there is no assurance that Los Esteros and Delta will be able to pay even their post-petition administrative expenses. Los Esteros and Delta respond that although they are not required by Commission precedent and provided that their proposed revisions are suspended for a nominal period, "to allay any concerns and as a demonstration of good faith, [Delta and Los Esteros] voluntarily commit to establish, consistent with any bankruptcy requirements, escrows for the amounts by which their filed 2006 rates exceed their 2005 rates."

III. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept Delta Energy's and Los Esteros' joint answers and the California Parties' answer because they have provided information that assisted us in our decision-making process.

23. We will grant the California Parties' motion to consolidate Docket Nos. ER06-268-000, ER06-268-001, ER06-261-000, and ER03-510-006 since these proceedings raise common issues of law and fact and consolidation will result in procedural efficiencies.

B. Hearing and Settlement Judge Procedures

24. Los Esteros' and Delta's proposed revisions raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

25. Our preliminary analysis indicates that Los Esteros' and Delta's proposed revisions have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept

Los Esteros' and Delta's proposed revisions for filing, suspend them for a nominal period, make them effective January 1, 2006, as requested,¹¹ subject to refund, and set them for hearing and settlement judge procedures. Pursuant to the terms of the Settlement Agreement in Docket No. ER03-510-000, we will reinstitute proceedings in that docket and set it for hearing and settlement judge procedures in Docket No. ER03-510-006.

26. Delta and Los Esteros' voluntary commitment to establish an escrow account, in which they will place all potential refunds for the amounts that their filed 2006 rates exceed their 2005 rates, provided that their actions are consistent with any bankruptcy requirements, should alleviate the concerns the California Parties have raised regarding potential refunds.

27. We will deny PG&E's and the California Commission's motion to reject Los Esteros' and Delta's filings. Schedule B, Paragraph 8 of Delta's and Los Esteros' existing RMR Agreements expressly authorizes use of Schedule F in their annual limited section 205 filings. The RMR Agreements do not condition these section 205 filings under any agreements based on LARS bids. Additionally, Delta's RMR Agreement, in Schedule B, Paragraph 8, authorizes Delta's use of Schedule F in its annual limited section 205 filing for contract year 2006, upon expiration of the Settlement Agreement. We further find that Los Esteros' and Delta's filings substantially comply with the threshold filing requirements of section 35.13 of the Commission's regulations and, therefore, PG&E's and the California Commission's request for rejection of the filing is denied.

28. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

¹¹ See *Central Hudson Gas & Electric Corporation*, 60 FERC ¶ 61,106 at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (finding that waiver of notice will generally be appropriate when a rate increase and its effective date are prescribed by an agreement on file with the Commission).

¹² 18 C.F.R. § 385.603 (2005).

otherwise, the Chief Judge will select a judge for this purpose.¹³ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Los Esteros' proposed revisions are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2006, as requested, subject to refund, as discussed in the body of this order.

(B) Delta's proposed revisions are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2006, as requested, subject to refund, as discussed in the body of this order.

(C) PG&E's and the California Commission's motion to reject Los Esteros' and Delta's proposed revisions is hereby denied.

(D) Docket Nos. ER06-268-000, ER06-268-001, ER06-261-000, and ER03-510-006 are hereby consolidated for purposes of hearing and decision.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Los Esteros' and Delta's proposed revisions. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (F) – (H) below.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603

¹³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(G) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.